NO. 47434-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

DAVID VALDEZ,

Appellant.

RESPONDENT'S BRIEF

RYAN JURVAKAINEN
Prosecuting Attorney
AILA R. WALLACE/WSBA 46898
Deputy Prosecuting Attorney
Representing Respondent

HALL OF JUSTICE
312 SW FIRST
KELSO, WA 98626
(360) 577-3080

TABLE OF CONTENTS

PAGE

A. REPLY TO ASSIGNMENTS OF ERROR 1

B. STATEMENT OF THE CASE 1

C. ARGUMENT 3

1. THE TRIAL COURT DID NOT ERR BY GIVING INSTRUCTION NO. 7, AS THE INSTRUCTION DID NOT CONSTITUTE A JUDICIAL COMMENT ON THE EVIDENCE, NOR DID IT RELIEVE THE STATE OF ITS BURDEN TO PROVE EVERY ELEMENT OF THE CRIME CHARGED. 3

2. TRIAL COUNSEL DID NOT OBJECT TO OFFICER KELLY'S TESTIMONY, SO THE ISSUE IS WAIVED ON APPEAL. IF THE COURT HEARS THIS ISSUE, THE TESTIMONY WAS NOT IMPROPER AS A POLICE OFFICER MAY TESTIFY TO HIS OR HER OPINION. 5

3. TRIAL COUNSEL WAS NOT INEFFECTIVE IN FAILING TO OBJECT TO OFFICER KELLY'S TESTIMONY AS THE FAILURE TO OBJECT WAS A TACTICAL DECISION, AND THE DEFENDANT CANNOT SHOW PREJUDICE BECAUSE HE CANNOT SHOW THAT THE OBJECTION WOULD HAVE BEEN SUSTAINED. 6

A. COUNSEL'S FAILURE TO OBJECT WAS A TRIAL TACTIC. 8

B. THE DEFENDANT FAILS TO SHOW AN OBJECTION WOULD BE SUSTAINED, AS THE OFFICER'S COMMENTS DID NOT AMOUNT TO INADMISSIBLE OPINION EVIDENCE. 9

C. IF THERE WAS ERROR, THE DEFENDANT DOES NOT PROVE THE RESULT OF THE TRIAL WOULD HAVE BEEN DIFFERENT. .. 11

4. THE TRIAL COURT'S REASONABLE DOUBT INSTRUCTION, WHICH EXACTLY MATCHES THE WASHINGTON PATTERN JURY INSTRUCTIONS, WAS PROPER AS IT DID NOT VIOLATE THE DEFENDANT'S RIGHTS, UNDERMINE THE PRESUMPTION OF INNOCENCE, OR SHIFT THE BURDEN OF PROOF TO THE DEFENSE. 11

D. CONCLUSION 12

TABLE OF AUTHORITIES

Page

Cases

City of Seattle v. Heatley, 70 Wn. App. 573, 854 P.2d 658 (1993) 10

Gregoire v. City of Oak Harbor, 170 Wn.2d 628, 244 P.3d 924 (2010) 3

In Re Pers. Restraint of Davis, 152 Wn.2d 647, 101 P.3d 1 (2004) 9

State v. Barragan, 102 Wn. App. 754, 9 P.3d 942 (2000) 7

State v. Becker, 132 Wn. 2d 54, 935 P.2d 1321 (1997) 3

State v. Bennett, 161 Wn.2d 303, 165 P.3d 1241 (2007) 11

State v. Demery, 144 Wn.2d 753, 30 P.3d 1278 (2001) 9

State v. Ermert, 94 Wn.2d 839, 621 P.2d 121 (1980 8

State v. Guloy, 104 Wn.2d 412, 705 P.2d 1182 (1985) 5

State v. Hendrickson, 129 Wn.2d 61, 917 P.2d 563 (1996) 8

State v. Humphries, 21 Wn. App. 405, 586 P.2d 130 (1978) 4

State v. Jackson, 145 Wn. App. 814, 187 P.3d 321 (2008) 4

State v. Jury, 19 Wn. App. 256, 576 P.2d 1302 7

State v. Kirkman, 159 Wn.2d 918, 155 P.3d 125 (2007) 5

State v. Lane, 56 Wn. App. 286, 786 P.2d 277 (1989) 11

State v. Lord, 117 Wn.2d 829, 822 P.2d 177 (1991) 8

State v. Mabry, 51 Wn. App. 24, 751 P.2d 882 (1988) 11

State v. Madison, 53 Wn. App. 754, 770 P.2d 662 (1989) 8

State v. McFarland, 127 Wn.2d 322, 899 P.2d 1251 (1995) 7, 8

State v. Myers, 86 Wn.2d 419, 545 P.2d 538 (1976) 7

State v. Pirtle, 127 Wn.2d 628, 904 P.2d 245 (1995) 11

State v. Saunders, 91 Wn. App. 575, 958 P.2d 364 (1998) 8

State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987) 7

State v. Visitacion, 55 Wn. App. 166, 776 P.2d 986 (1989) 8

State v. Winings, 126 Wn. App. 75, 10 P.3d 141 (2005) 3

State v. WWJ Corp., 138 Wn.2d 595, 980 P.2d 1257 (1999) 5

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984) 6, 7

Other Authorities

Article IV, Section 16 of the Washington Constitution 3

WPIC 35.50 3

WPIC 4.01 11

Rules

RAP 2.5(a) 5

RAP 2.5(a)(3) 5

A. REPLY TO ASSIGNMENTS OF ERROR

1. The trial court did not err by giving Instruction No. 7, as the instruction did not constitute a judicial comment on the evidence, nor did it relieve the State of its burden to prove every element of the crime charged.

2. Trial counsel did not object to Officer Kelly's testimony; therefore the defendant cannot raise this issue on appeal.

3. If the Court hears the issue of Officer Kelly's testimony, the opinion testimony did not invade the province of the jury or infringe the defendant's rights, as a police officer may properly testify to his or her opinion.

4. Trial counsel was not ineffective in failing to object to Officer Kelly's testimony as the failure to object was a tactical decision and the defendant cannot show prejudice because he cannot show that the objection would have been sustained.

5. The trial court's reasonable doubt instruction, which exactly matches the Washington Pattern Jury Instructions, was proper as it did not violate the defendant's rights, undermine the presumption of innocence, or shift the burden of proof to the defense.

B. STATEMENT OF THE CASE

On December 23, 2014, officers responded to a gas station on Ocean Beach Highway in Longview for a disorderly person. RP 70. Officers Price and Woodard contacted the defendant, David Valdez, who was intoxicated and asleep inside the store. RP 71. The defendant was ultimately escorted out of the store and placed under arrest for disorderly conduct. RP 43; RP 79. The defendant struggled with the officers while they were trying to

arrest him, bringing his arms in and underneath his body so they could not handcuff him. RP 80. Eventually, the officers handcuffed the defendant and searched him incident to arrest. RP 84; RP 86.

As the officers were searching the defendant, he continued to struggle and make profane comments. Officer Woodard was on the defendant's left, Officer Kelly was directly behind the defendant, and Officer Price was on the right. RP 85. Officer Woodard then heard a sound like the gathering of spit and saw the defendant's head turn toward him. RP 86. He was able to turn his head over his right shoulder as he heard the defendant spit. The defendant then spit on Officer Woodard's ear. RP 86.

The State charged the defendant with Assault 3 and Resisting Arrest, and the case proceeded to trial on March 10, 2015. CP 1–2; RP 4. Officer Kelly testified that he "saw the Defendant turn his head to the left and spit up at Officer Woodard." RP 161. When asked by the prosecutor if the defendant intentionally cleared his throat and intentionally spit, Officer Kelly replied, "yes." RP 164. Defense counsel did not object to this testimony. RP 164. The jury found the defendant guilty. CP 24, 25.

C. ARGUMENT

1. The trial court did not err by giving Instruction No. 7, as the instruction did not constitute a judicial comment on the evidence, nor did it relieve the State of its burden to prove every element of the crime charged.

Article IV, section 16 of the Washington constitution prohibits a judge from conveying his personal feelings or attitudes about a case to the jury. *State v. Becker*, 132 Wn. 2d 54, 64, 935 P.2d 1321 (1997). That section also prohibits a judge from instructing the jury that "matters of fact have been established as a matter of law." *Id.* However, a jury "instruction that states the law correctly and is pertinent to the issues raised in the case does not constitute a comment on the evidence." *State v. Winings*, 126 Wn. App. 75, 89, 10 P.3d 141 (2005). Challenged jury instructions are reviewed de novo. *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 635, 244 P.3d 924 (2010).

The instruction regarding the definition of assault given in this case, instruction number seven, mirrored Washington Pattern Jury Instruction 35.50. CP 17; WPIC 35.50. The court's instruction read:

> An assault is an intentional touching of or spitting on another person that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or spitting is offensive if the touching or spitting would offend an ordinary person who is not unduly sensitive.

CP 17. Instruction 7 therefore states that spitting may be an assault provided that it is both intentional and offensive. This is a correct statement of the law.

In *State v. Humphries*, the court found no error in the prosecutor characterizing spitting as an assault. 21 Wn. App. 405, 409, 586 P.2d 130 (1978). Similarly, in *State v. Jackson*, the court drew upon "a multitude of cases holding that spitting on another is physical contact constituting either a battery or a criminal assault" to find that ejaculating on another person constituted a "touching." 145 Wn. App. 814, 821, 187 P.3d 321 (2008). The *Jackson* court concluded by saying, "[F]or over three centuries, the common law has considered the projection of one's bodily fluid onto another a touching sufficient to support a criminal conviction." *Id.* Therefore, Jury Instruction number 7 is a correct statement of the law and was not a comment on the evidence.

Jury instruction number 7 also did not relieve the State of its burden of proving an intentional touching. The instruction states that intentionally spitting on another person is a crime. The spitting must be both intentional and offensive for the spitting to be a crime. The instruction as given did not allow for a conviction based on a showing that the defendant intentionally spat -- rather, the instruction requires that he intentionally spit *on* another

person. The jury instruction is a correct statement of the law and did not relieve the State of its burden.

2. Trial counsel did not object to Officer Kelly's testimony, so the issue is waived on appeal. If the court hears this issue, the testimony was not improper as a police officer may testify to his or her opinion.

Generally, appellate courts will not consider issues raised for the first time on appeal. RAP 2.5(a); *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). A party may raise a claim of error for the first time on appeal if it is a manifest error affecting a constitutional right. RAP 2.5(a)(3); *Kirkman*, 159 Wn.2d at 926. "To raise an error for the first time on appeal, the error must be 'manifest' and truly of constitutional dimension." *Id.*; *State v. WWJ Corp.*, 138 Wn.2d 595, 602, 980 P.2d 1257 (1999). Even if the error is manifest and constitutional, it is still subject to harmless error analysis. In determining whether an error is harmless, the court determines whether the error caused actual prejudice. If the appellate court is "convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error," the error is harmless. *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985).

Here, the defendant raises a potential constitutional issue. However, he has not made the requisite showing that the error had an effect on the outcome of the case. Officer Kelly testified that he had contacted the

defendant twice on the day of the incident, and that he was drunk and disorderly the first time. RP 154. The second time Officer Kelly contacted the defendant, he observed two officers struggling to get the defendant's hands behind his back. RP 158. During this second interaction, Officer Kelly testified the defendant was very upset, was yelling and screaming, and was using crude language. RP 160. Officer Kelly then testified that he saw the defendant turn his head and spit up at Officer Woodward, as Officer Woodard is taller than the defendant. RP 161. Officer Woodard further testified that the defendant was leaning or pressed against the SUV, and that he had to turn to spit up at the officer. RP 116. The spitting happened directly after the defendant said "fuck you" to the officer. RP 117. Given that the defendant was angry and upset, and Officer Kelly observed him turn his head significantly and spit on Officer Woodard, the outcome of the trial would not have differed had Officer Kelly not used the word "intentional." Any error was therefore harmless.

3. Trial counsel was not ineffective in failing to object to Officer Kelly's testimony as the failure to object was a tactical decision, and the defendant cannot show prejudice because he cannot show that the objection would have been sustained.

To establish ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficiency prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104

S. Ct. 2052 (1984); *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). There is a strong presumption of effectiveness that a defendant must overcome. *Strickland*, 466 U.S. at 689. To prove that counsel was deficient, "the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.*; *State v. Barragan*, 102 Wn. App. 754, 762, 9 P.3d 942 (2000). Thus, one claiming ineffective assistance must show that in light of the entire record, no legitimate strategic or tactical reasons support the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 335–36, 899 P.2d 1251 (1995).

The Washington Court of Appeals has devised the following test to determine whether counsel was ineffective: "After considering the entire record, can it be said that the accused was afforded an effective representation and a fair and impartial trial?" *State v. Jury*, 19 Wn. App. 256, 262, 576 P.2d 1302, *citing State v. Myers*, 86 Wn.2d 419, 424, 545 P.2d 538 (1976). Like the *Strickland* test, this test requires the defendant to prove that he was denied effective representation, given the entire record, and that he suffered prejudice as a result. *Id.* at 263. The first prong of this two-part test requires the defendant to show that his lawyer "failed to exercise the customary skills and diligence that a reasonably competent attorney would exercise under similar circumstances." *State v. Visitacion*,

55 Wn. App. 166, 173, 776 P.2d 986 (1989). The second prong requires the defendant to show "there is a reasonable probability that, but for the counsel's errors, the result of the proceeding would have been different." *Id.* Therefore, even if a defendant can show that counsel was deficient, he or she also must show that the deficiency caused prejudice.

To establish ineffective assistance for failure to object, the defendant must show (1) an absence of legitimate strategic or tactical reasons supporting the challenged conduct; (2) that an objection to the evidence would likely have been sustained; and (3) that the result of the trial would have been different had the evidence not been admitted. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998), citing *McFarland*, 127 Wn.2d at 336, and *State v. Hendrickson*, 129 Wn.2d 61, 80, 917 P.2d 563 (1996).

a. Counsel's failure to object was a trial tactic.

Courts have declined to find ineffective assistance of counsel when the actions of counsel go to the theory of the case or to trial tactics. *State v. Ermert*, 94 Wn.2d 839, 849, 621 P.2d 121 (1980). Differences of opinion regarding trial strategy or tactics are not sufficient to prove a claim of ineffective assistance of counsel. *State v. Lord*, 117 Wn.2d 829, 822 P.2d 177 (1991). "The decision of when or whether to object is a classic example of trial tactics." *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). This court presumes that the failure to object was the product of

legitimate trial strategy or tactics, and the onus is on the defendant to rebut the presumption. *In Re Pers. Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004).

In this case, it was a legitimate trial tactic to not object to the officer's testimony. A trial attorney may choose not to object to a question or a response so as not to draw more attention to it. In this case, the questioning and responses regarding the defendant's intent were brief. The prosecutor asked, "So he had to intentionally – he intentionally cleared his throat?" Officer Kelly responded, "Yes." The prosecutor then asked "And turned and intentionally spat?" Officer Kelly again responded, "Yes." The prosecutor then moved on to questions about how Officer Woodward looked after he was spit on. The questioning was brief and trial counsel could well have decided that objecting would only serve to highlight the officer's opinion that the spitting was intentional. Decisions regarding when or whether to object are presumed to be trial tactics, and that is so in this case. Therefore, counsel was not ineffective.

b. The defendant fails to show an objection would be sustained, as the officer's comments did not amount to inadmissible opinion evidence.

In general, no witness is allowed to offer opinion evidence regarding guilt or veracity of the defendant, as it may invade the exclusive province of the jury. *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001).

However, "testimony that is not a direct comment on the defendant's guilt or on the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion testimony." *City of Seattle v. Heatley*, 70 Wn. App. 573, 578, 854 P.2d 658 (1993). Opinion testimony involving central disputed issues is admissible as long as the testimony does not give a direct opinion on the defendant's guilt." *Id.* "The fact that an opinion encompassing ultimate factual issues supports the conclusion that the defendant is guilty does not make the testimony an improper opinion on guilt." *Id.* at 579.

In this case, Officer Kelly's testimony that the defendant intentionally spit was not an improper opinion. The testimony supports the conclusion that the defendant is guilty, but that alone does not make it improper. Officer Kelly did not say he thought the defendant was guilty, nor did he use the word "assault." He described the sound the defendant made in preparing to spit, described the defendant turning his head, and described the action of spitting. RP 163–165. His opinion that the actions appeared intentional does not constitute improper opinion testimony, so the defendant has not shown that an objection would have been sustained.

c. *If there was error, the defendant does not prove the result of the trial would have been different.*

Finally, even if allowing Officer Kelly's testimony was error, as discussed above, the defendant does not show the results of the trial would have been different. Therefore, he has not shown ineffective assistance of counsel.

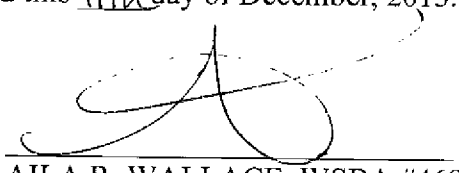
4. The trial court's reasonable doubt instruction, which exactly matches the Washington Pattern Jury Instructions, was proper as it did not violate the defendant's rights, undermine the presumption of innocence, or shift the burden of proof to the defense.

The reasonable doubt instruction used in the defendant's trial mirrored WPIC 4.01. CP 13. WPIC 4.01 has been approved by several courts. *See State v. Bennett*, 161 Wn.2d 303, 165 P.3d 1241 (2007); *State v. Pirtle*, 127 Wn.2d 628, 904 P.2d 245 (1995); *State v. Lane*, 56 Wn. App. 286, 786 P.2d 277 (1989); *State v. Mabry*, 51 Wn. App. 24, 751 P.2d 882 (1988). Furthermore, the Washington Supreme Court has required trial courts of this State to use WPIC 4.01 until a better instruction is approved. *Bennett*, 161 Wn.2d at 318. Because there has been no other instruction approved since *Bennett*, the trial court in this case was required to use WPIC 4.01. There is no constitutional violation from an instruction that is a correct statement of the law.

D. CONCLUSION

The defendant's convictions for Assault 3 and Resisting Arrest should be affirmed as the jury instructions were proper, the officer's testimony did not invade the province of the jury, counsel was not ineffective, and the reasonable doubt instruction was proper. The appeal should be denied.

Respectfully submitted this 11th day of December, 2015.



AILA R. WALLACE, WSBA #46898
Attorney for the Respondent

CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

Jodi R. Backlund
Attorney at Law
P.O. Box 6490
Olympia, WA 98507
backlundmistry@gmail.com

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on December 11th 2015.

Michelle Sasser
Michelle Sasser

COWLITZ COUNTY PROSECUTOR

December 11, 2015 - 2:35 PM

Transmittal Letter

Document Uploaded: 1-474344-Respondent's Brief.pdf

Case Name: David Valdez
Court of Appeals Case Number: 47434-4

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Respondent's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Michelle Sasser - Email: sasserm@co.cowlitz.wa.us

A copy of this document has been emailed to the following addresses:

backlundmistry@gmail.com